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CREDITOR INSURANCE AND CREDITORS' RIGHTS

It happens sometimes that basic propositions are accepted by courts before they win the unanimous support of the bar, to say nothing of students and teachers of the law. In such cases the courts are carried along by a tide of logic and tradition, whose measure perhaps they may not fully state in opinions handed down; but observers and even practitioners, not being so directly within the reach of these silent forces, are therefore not as forward with their responses. And thus again and again will the same questions be presented for decision, and the tone of judicial replies assume more and more of the dogmatic. A section of law thus involved does not so much grow as become apparent, or, perhaps it should be said, catholic in the sense of its acceptance.

Particularly is this so with those features of our law which deal with the rights of a creditor regarding his debtor's property. Some years ago the present writer had occasion to assemble certain principles which he regarded as guiding the courts in dealing with this subject.¹ So general had been the judicial response to these principles, that no claim of originality or novelty was put forward in connection with the task which was undertaken. Yet the fact that, since the publication of the book in question, certain propositions it mentioned have again gone to the courts for review, with the same judicial reaction as a result, might alone justify further remarks on the same line.

Even more point, however, can be given to this postscript by applying it to insurance law as bearing on the relation of creditor and debtor. In cases of that sort confusion is possible, and occasionally occurs, through failure to ascertain the point where insurance law leaves off and the law of creditors' rights begins. The result is that a case will be considered as involving a problem of insurance law when in reality it presents nothing but another phase of one of the

¹ Glenn, *Creditors' Rights* (1915).

oldest of relations, that of debtor and creditor. And although these misconceptions have left no actual results, yet traces of them appear in the language of judgment and comment sufficient to excite interest and to justify a fresh statement of obvious truths.

At the outset it is clear that the relation of debtor and creditor may be most directly affected by those policies which cover the debtor's life and his property. Possibly it may be illustrated by other kinds of insurance as well, but with life and property insurance the relation is most apparent, and it is quite clear that certain other underwritings cannot involve the relation at all. The New York courts have aptly shown this in the instance of mortgagee insurance. If the secured creditor insures the collateral against fire or the perils of the sea, then the relation is involved to the extent that if the debtor is entitled to have the proceeds of the collection credited on the mortgage debt, *per contra* the underwriter should have no claim by subrogation against the debtor.² But if the policy covers the due payment of the debt—credit insurance, as it has since come to be called,—then the debtor has no interest in the application of the insurance money,³ and, of course, there should be subrogation to the debt if the underwriter pays. Insurance on the debtor's property and on his life, therefore, are the two classes of underwriting that most clearly require a consideration of the relation, in law, of the debtor to his creditor.

We may start with this, that being the creditor of another, in and to itself, gives you nothing more than the right to proceed to judgment. Until that time you have no right to touch or interfere with any particular part of your debtor's assets.⁴

Nor is the situation really altered by the debt being secured. The result is simply that instead of one contract you have two, the one creating the debt itself, and the other giving a specific right of disposal of a certain portion of the debtor's assets. This is illustrated by the proposition that a mortgage may be foreclosed even after the Statute of Limitations has barred a suit on the mortgage debt.⁵ It is further shown by the fact that a mortgage debt may be due and yet the mortgage may temporarily forbid foreclosure, as where it provides that a default in the payment of interest or taxes must con-

² *Ulster Savings Inst. v. Leake* (1878) 73 N. Y. 161, 165; *Kernochan v. New York Bowery Ins. Co.* (1858) 17 N. Y. 428. But if the debtor has no such right, then the insurer should have subrogation. And, outside of Massachusetts *Suffolk Co. v. Boyden* (1864) 91 Mass. 123, such is the prevailing rule. Richards, *Insurance* (3rd ed. 1909) 65; *Foster v. Van Reed* (1877) 70 N. Y. 19, 26.

³ See *Excelsior Fire Ins. Co. v. Royal Ins. Co.* (1873) 55 N. Y. 343, 345.

⁴ Glenn, *Creditors' Rights* (1915) Chap. I. To the cases cited for this elementary proposition, there might well be added *Equitable Life Ass. Society v. Brown* (1909) 213 U. S. 25, 29 Sup. Ct. 404.

⁵ Jones, *Mortgages* (6th ed. 1904) § 1206; *Houser v. Carr* (1906) 185 N. Y. 453, 78 N. E. 171; *Slingerland v. Sherer* (1891) 46 Minn. 422, 49 N. W. 237; *Talbot v. Hill* (C. C. A. 1919) 261 Fed. 244.

tinue for a certain period before the mortgagee is entitled to foreclose.⁶ And, again, we may note the familiar rule which allows a mortgagee to hold a subsequent purchaser of the property who assumes the mortgage debt. The mere purchase of the property, without more, does not make the purchaser liable for the debt; all that can happen to him is that he will lose his property by foreclosure unless the debt is paid. But if he assumes the debt as part of his bargain of purchase from the original mortgagor, then he may also be held on the debt. The New York reasoning for this proposition flows from the doctrine of *Lawrence v. Fox*, and rests therefore on the basis that the beneficiary of a contract, under the circumstances thus disclosed, may sue thereon.⁸ No such reasoning, however, can be given by the Courts in those jurisdictions which, while not following *Lawrence v. Fox*, nevertheless allow the mortgagee to hold the mortgagor personally on the debt thus assumed.⁹ An able writer has stated that the result in such jurisdictions is "no more than the application by a court of equity of property of a debtor, the mortgagor, to payment of the debt."¹⁰ But it is here submitted, on the contrary, that it amounts only to an interpretation of the original contract of hypothecation,—an extension of its subject matter, by implication, to the *chose* in action arising from such subsequent sale of the premises as the mortgagor might make, where the sale embraces as part of its consideration the assumption of the mortgage debt by the new buyer.

Now, when the unsecured creditor obtains judgment, he too gets certain privileges regarding his debtor's property. But they are all embraced in the single right to realize the debt by application thereto of the debtor's property. Such ancillary aid as is afforded by equity, when invoked by means of a judgment creditor's bill, adds nothing to the measure of the creditor's right; it simply increases the number of the objects of realization. The writ of execution which issues as of

⁶ "It is clear from the provisions of the deed of trust, that the bondholders have no right to require a sale until after default by the company continued for at least six months. This is conceded." *Potomac Manufacturing Co. v. Evans* (1888) 84 Va. 717, 719, 6 S. E. 2. "Therefore a demand for the payment of her coupons and a failure to pay for six months were necessary to make the principal of the bonds payable." *Railway v. Sprague* (1880) 103 U. S. 756, 761. "The plaintiff's right of action is based solely upon the language of his contract, and if he does not make out a right to recover by virtue of its terms, his action must necessarily fail." *Batchelder v. Council Grove Water Co.* (1892) 131 N. Y. 42, 47, 29 N. E. 801.

⁷ *Farmers Loan and Trust Co. v. Penn Plate Glass Co.* (1901) 186 U. S. 434, 22 Sup. Ct. 842; *King v. Whitely* (N. Y. 1843) 10 Paige 465; *Osborn v. Cabell* (1883) 77 Va. 462; *Norwood v. DeHart* (1879) 30 N. J. Eq. 412; *In re Amsdell-Kirchner Brewing Co.* (D. C. 1917) 240 Fed. 492; *Allen v. Phila. etc. Co. et al.* (C. C. A. 1920) 265 Fed. 817.

⁸ *Vrooman v. Turner* (1877) 69 N. Y. 280.

⁹ *Crowell v. Hospital of St. Barnabas* (1876) 27 N. J. Eq. 650; *Keller v. Ashford* (1889) 133 U. S. 610, 10 Sup. Ct. 494.

¹⁰ Williston, *Contracts for the Benefit of a Third Person* (1902) 15 Harvard Law Review 767, 789.

course under the judgment can reach only tangible property; the office of equity is to lay hold of the debtor's intangible assets,—accounts receivable, trust interests and the like,—as well. The result is that by means of these two methods of procedure the creditor can realize his debt out of anything which the debtor can sell.

But this right of realization is not a roving privilege. The creditor has no power to select in advance a particular portion of the debtor's property, and then to deprive the debtor of the right of disposal of it. Except where a judgment operates by way of statute as a lien on the debtor's property, the debtor may freely dispose of it, prior to its being taken into the custody of the law for the purpose of realization, so long as enough is left for the creditor to realize on; and that is why the doctrine of fraudulent conveyances is tied up with the question of the debtor's solvency or insolvency.¹¹

At this juncture another elementary idea comes to mind. The every-day form of execution does not coerce payment, as was erroneously said in one case;¹² on the contrary it produces payment out of the property without the debtor having anything to do or say with regard to the matter. Of course by satisfying the judgment he can get the execution released, but that is a different thing from saying that the office of the writ of *fi. fa.* or *lev. fa.* is to make the debtor pay the judgment. True, it was different with a body execution, because there the restraint of the debtor's person was intended as an inducement to payment of the debt, and hence in its practical operation this writ in no wise differed from equity's original method of coercing the payment of a money decree.¹³ But an execution on property induced payment to no greater extent than does a mortgage; and a body execution enforced it only through restraint of personal freedom, and in no further degree.

Finally, liquidation proceedings furnish no real exception to the above rules. Their primary object is the realization of the debtor's assets for the benefit of his creditors; the only new features being the ideal of equality in the distribution, and the restrictive measures necessarily involved to prevent the individual creditor from going outside the field of distribution in order to attain an advantage over his fellows. But it should be observed, in this connection, that there are certain principles of classification regarding these proceedings which have never yet been overlooked and are too deeply rooted in legal history to be overturned at this late date. Liquidation proceed-

¹¹ Glenn, *Creditors' Rights* (1915) Chaps. I, III, V and VI. The Uniform Fraudulent Conveyances Act, which the writer recently had occasion to review, (1920) 20 COLUMBIA LAW REVIEW 339, recognizes this proposition by embracing in a distinct section (§ 2), a definition of insolvency.

¹² *Allen v. Wells* (Mass. 1839) 22 Pick. 450.

¹³ See Professor Cook's inquiry into the operations of equity *in personam* (1915) 15 COLUMBIA LAW REVIEW 37, 106, 228.

ings, in short, must be either statutory, in which case the statute, read in the light of history, governs; or equitable, residing in a certain winding-up jurisdiction inherent in equity. The statutory proceedings, such as bankruptcy and corporate dissolution, and those nowadays exercised by probate courts over the estates of decedents, are one thing; their jurisdiction is as broad as the statute goes. Outside of statute, there is a liquidating jurisdiction of equity; but that jurisdiction has fixed rules which limit it to certain classes and no others, *viz.*: the corporation, the limited partnership, and the estate of a decedent; jurisdiction over the corporation and the limited partnership, indeed, being but an extension of a control which originated with estates of decedents.¹⁴ In other words, originally the jurisdiction of equity was asserted in the case of the estate of an insolvent decedent; to-day by similar reasoning, it is maintained in the cases of insolvent corporations and of limited partnerships.

But it does not go beyond those limits; there can be no "equitable receivership" of the affairs of an individual, except on a judgment creditor's bill, and in that case there is no equality in the distribution. Since the publication of the writer's book already mentioned, contrary ideas several times have been asserted, but on each occasion the claim has been judicially denied.¹⁵ One of these latter-day cases involved the reversal of a lower court which, with great labor, had decided that equity could create a receivership of an insolvent individual trader.¹⁶ And so easy is it to overlook historical considerations that this unique conclusion was applauded in a place most high.¹⁷ Indeed, as the writer has yet to read any full-hearted approval of the action of the Pennsylvania Supreme Court in reversing this decision,¹⁸ it might be well to let the court speak for itself:

"An inspection of the bill shows that it was filed for the express purpose of securing the appointment of a receiver for the assets of an individual, and to provide for the management and disposal of those assets. For such a purpose, the plaintiffs in the original bill have no standing in an equity court of Pennsylvania. The supervision and control of partnerships, and of corporations, are recognized heads of equity jurisdiction, but the administration of the affairs of an individual, *sui juris* and *compos mentis*, is not. The fact that an in-

¹⁴ Glenn, *Creditors' Rights* (1915) Chap. XVI.

¹⁵ *Davis v. Hayden* (C. C. A. 1916) 238 Fed. 734; *Thompson v. Adams* (1906) 60 W. Va. 463, 55 S. E. 668; *Hogsett v. Thompson* (1917) 258 Pa. St. 85, 101 Atl. 941. In *Davis v. Hayden* the distinction between the judgment creditor's bill applicable to all debtors, but not allowing of equality of distribution, and the winding-up bill, of which equality in distribution is of the essence, but which lies only against certain kinds of debtors (Glenn, *Creditors' Rights* (1915) Chapters I and XVI) is carefully noted. See also *Grant v. Giuffrida* (Ct. of App. D. C. 1920) 267 Fed. 330.

¹⁶ *Thompson's Receivership* (1916) 44 Pa. County Ct. 518.

¹⁷ (1917) 30 Harvard Law Review 273.

¹⁸ It was reviewed in this magazine, (1917) 17 COLUMBIA LAW REVIEW 714, but not with reference to the point discussed in the text.

dividual is not able to meet his obligations is not in itself sufficient to warrant the appointment of a receiver of his property, or the issuing of an injunction to restrain his creditors from attempting to collect their claims. . . . If the defendant here is solvent, as is alleged, a court of equity has no power to place his property beyond the reach of his creditors, or to enjoin them from resorting to the remedies which the law has given to them for the protection of their claims. If he is insolvent the law also provides appropriate means for the distribution of his estate for the benefit of his creditors. It follows that the court below erred in appointing receivers for the property of defendant and in restraining his creditors from prosecuting suits at law or in equity against the defendant."¹⁹

And lately it has been decided that a loose statute,—some states have such laws,—which on its face allows any creditor to obtain a receivership of the property of an insolvent debtor, with no express requirement of a judgment, should not be read, having in mind the historical considerations properly applying, so as to allow non-judgment creditors to obtain a chancery winding-up of the affairs of an individual.²⁰ Furthermore, no court has allowed itself to be deceived, by virtue of the fact that in most of the states to-day,—with the exception of a few where jurisdiction is still exercised in equity,²¹—statutes have transferred to probate courts the jurisdiction of decedents' estates which was formerly exercised by equity, into the belief that this new jurisdiction applies to anything but the estate of a decedent.²² Likewise statutes may deprive equity of its liquidating jurisdiction over corporations; but it is only because these statutes afford a full and adequate remedy for the fair distribution of assets among the creditors;²³ and therefore when such statutes can by their terms have no application, as in the case of a foreign corporation doing business in the state of the forum, but in course of dissolution in its native state, the old equity jurisdiction may still be asserted as to local assets.²⁴

There is no trouble about applying these rules to insurance on the debtor's property. And to demonstrate this, the easiest case to take first is that of the creditor who wishes to insure, by way of a fire or marine policy, the collateral he holds for his debt.

That the secured creditor may lawfully effect such insurance, and recover in case of loss, has never been doubted.²⁵ It matters not how

¹⁹ *Hogsett v. Thompson*, *supra*, footnote 15, at page 93.

²⁰ *Thompson v. Adams*, *supra*, footnote 15; *Davis v. Hayden*, *supra*, footnote 15.

²¹ Such as Virginia, West Virginia, and—in a measure—Georgia. See *Smith v. Jennings* (C. C. A. 1915) 238 Fed. 48.

²² See *Matter of Heinze* (1917) 179 App. Div. 453, 165 N. Y. Supp. 1017.

²³ *Bliven v. Peru Co.* (N. Y. 1881) 9 Abb. N. C. 205; *Hitch v. Hawley* (1892) 132 N. Y. 212, 30 N. E. 401.

²⁴ *Mitchell v. Banco, etc.* (1920) 192 App. Div. 720, 183 N. Y. Supp. 446.

²⁵ *Hill v. Secretan* (1798) 1 B. & P. 315; *Ins. Co. v. Stinson* (1880) 103 U. S. 25.

good the mortgagor may be for the debt,²⁶ nor how much other collateral the creditor may also hold,²⁷ the creditor still may insure the particular collateral. All he needs to show is that by operation of law or by contract the property is affected by his lien: by contract as in the case of a mortgage or pledge, by law as in the case of a mechanic's lien or an admiralty lien, of which more will be said later. Of course if the debtor has no title there is nothing for the creditor to insure; water cannot rise higher than its source, as the defeated plaintiff might have recited when he learned that he could take nothing by virtue of a marine policy on a vessel, whose captain indeed was indebted to the plaintiff but unfortunately had no property right in the ship.²⁸

This directs us to an equally clear proposition, that without security a creditor cannot insure until he gets judgment. A simple creditor, whether by bond, note or contract, cannot lawfully insure a stick or stone of his debtor's estate unless he has acquired a lien thereon by way of conveyance or by operation of law.²⁹ Having no security, he gets no right to insure until he procures judgment on his claim; it is only after that point has been passed that he is in a position to insure anything of his debtor's.³⁰ "It certainly would not be claimed," said a New York court,³¹ "that a mere simple contract creditor could obtain a valid insurance of his debt from a fire insurance company. The creditor must have an interest in the real estate to authorize him to insure." This is illustrated by the two English cases of *Stainbank v. Fenning*³² and *Moran v. Uzielli*.³³ In the first of these cases it was held that a party furnishing supplies to a ship had no insurable interest in her. But in the second case, it appearing that the ship was foreign owned, an admiralty lien arose upon the ship itself, thus giving the plaintiffs an insurable interest upon which they could recover in case of the ship's loss. In the words of Walton, J., "all that the unsecured creditor has is an expectation." More than that he has not until he reduces his debt to judgment.

And even when the creditor gets judgment there is still a possibility of question. A judgment, at common law, simply gave the right to issue execution; the actual realization of the debt, by levy

²⁶ *Carter v. Humboldt Ins. Co.* (1861) 12 Ia. 287.

²⁷ *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, *supra*, footnote 3.

²⁸ *Lowry v. Bourdieu* (1780) 2 Dougl. 468.

²⁹ *Creed v. Sun Fire Office* (1893) 101 Ala. 522, 14 So. 323; *Leight v. Mut. Fire Ins. Co.* (1895) 169 Pa. St. 310, 32 Atl. 439.

³⁰ *Spare v. Home Mut. Ins. Co.* (C. C. 1883) 15 Fed. 707; *Grevenmeyer v. Mut. Ins. Co.* (1869) 62 Pa. St. 340; *Vancouver Nat. Bk. v. Law Union, etc. Co.* (C. C. A. 1907) 153 Fed. 440; *Stainbank v. Fenning* (1851) 11 C. B. 51; *Foster v. Van Reed*, *supra*, footnote 3; *Lowry v. Bourdieu*, *supra*, footnote 28.

³¹ *Foster v. Van Reed* (N. Y. 1875) 5 Hun 321, 325; reversed on other points, *supra*, footnote 3.

³² *Supra*, footnote 30.

³³ [1905] 2 K. B. 555.

and sale, being another step. After levying, the creditor has something to insure,³⁴ but what of his rights prior to actual levy?

By statute in many of our states, a judgment constitutes a lien on real property; but these statutes also generally provide that personal property shall first be applied to the satisfaction of judgments. Under such circumstances the question whether a judgment creditor can insure his debtor's real estate, simply because of the entry and docketing of a judgment, has led to some differences of opinion. It seems to be true, as stated by one court, that up to the date of its decision "no case had been found in which it was held that a judgment creditor, by reason simply of his lien on the judgment debtor's property, has an insurable interest thereon."³⁵ And in Pennsylvania it has been held that the mere docketing of a judgment does not give a creditor anything on which he can effect insurance.³⁶ After referring to the fact that a judgment is a general and not a specific lien, the Pennsylvania court says: "If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but only in the lien." This reasoning, however, seems a little sharp, but it is in line with another decision of the same court, where the plaintiff, the owner of a turnpike, insured a bridge belonging to the county, which constituted a necessary link in the turnpike. The court held that the plaintiff could not recover for loss of the bridge because it had insured the bridge as a bridge, instead, as has been suggested, of taking out a use and occupation policy based on the loss of tolls to the turnpike which would continue as long as the bridge remained unrestored.³⁷ A much sounder view is expressed in a Federal case, that a judgment creditor may lawfully insure at the moment of entering judgment, but in case of loss he must show "that at the time of the fire the amount of the judgment could not otherwise have been made on an execution against the property of the judgment debtor." In short, if there is other property at that moment of time out of which the judgment can be made, "the creditor has sustained no loss and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor."³⁸

The words just quoted suggest the vital distinction between the case where the creditor insures the debtor's property and the case where the debtor insures it himself. A contract between a debtor and an insurance company is simply an asset of the debtor, and the creditor cannot reach it except by direct proceedings under the judgment. Even

³⁴ *Donnell v. Donnell* (1894) 86 Me. 518, 30 Atl. 67.

³⁵ *Spare v. Home Mut. Co.*, *supra*, footnote 30.

³⁶ *Grevenmeyer v. Ins. Co.*, *supra*, footnote 30.

³⁷ *Farmers Mut. Co. v. New Holland Co.* (1888) 122 Pa. St. 37, 15 Atl. 563.

³⁸ *Spare v. Home Mut. Co.* *supra*, footnote 30, at page 711.

if he has actually levied on property, his levy does not in and of itself cover the proceeds of any policy thereon which the debtor meanwhile may have procured; such funds he can reach as equitable assets only by way of a judgment-creditor's bill.³⁹ The only other way for a creditor to reach the debtor's fire or marine insurance is by showing that the debtor has assigned it to him, or has made him the beneficiary of the policy.⁴⁰ By virtue of such reasoning, the proceeds of a mortgagor's insurance go to the mortgagee if it appears that the mortgagor had agreed to make this insurance for the mortgagee's benefit.⁴¹ It is also conceivable in such a case, that prior lienors may themselves claim the money⁴² but, in the absence of any such agreement, no lienors have any interest in the insurance or its fruits.⁴³

Thus the relation of debtor and creditor, in its primary aspects of security and no security, judgment and no judgment, fits in perfectly with the law covering such insurance as the creditor may secure on the property of the debtor. Nor does the line of logic disappear when we consider liquidation proceedings. In all such cases the distinguishing features are, first of all, the ideal of equality of distribution and, as one of the means of attainment, the creation of a common representative of the creditors at large, such as a receiver or a trustee in bankruptcy; it being of note that under the probate laws of most states, the executor or administrator has likewise that status.⁴⁴ Also, there is a liquidating point, so to speak, when the estate becomes dedicated in law to the payment of debts. In bankruptcy it is the adjudication; with an equity receivership, it is the appointment of the receiver; and with a decedent, it is the date of his death. "A dead man's estate, in short, is primarily a fund with which to pay his debts."⁴⁵ What is the response of insurance law to these principles?

Very prompt, in the case, as before, of insurance on the debtor's property. Until the liquidating point is reached, the debtor still has something to insure; and therefore, until an adjudication of bankruptcy has been made, the trader against whom a petition has been filed may properly effect insurance for his own account. Nay more, his right to insure continues until the creation of a representative of

³⁹ Not attainable by levy,—*Donnell v. Donnell*, *supra*, footnote 34; *St. Paul Ins. Co. v. Brunswick Grocery Co.* (1901) 113 Ga. 786, 39 S. E. 483; *Westminster Fire Office v. Glasgow, etc. Society* (1888) 13 A. C. 699. But is reachable by judgment creditor's bill or statutory substitutes therefor,—*Mapes v. Coffin* (N. Y. 1835) 5 Paige 296; *Lewenstein v. Forman* (1916) 223 Mass. 325, 111 N. E. 962.

⁴⁰ *Vancouver Bank v. Law Union, etc. Co.*, *supra*, footnote 30; *Leinkauf v. Colman* (1888) 110 N. Y. 51, 17 N. E. 389; *Spare v. Home Mut. Ins. Co.* (C. C. 1883) 17 Fed. 569.

⁴¹ *The Conveyor* (D. C. 1906) 147 Fed. 586; *Leinkauf v. Colman*, *supra*, footnote 40.

⁴² *The Conveyor*, *supra*, footnote 41.

⁴³ *Bright Grocery Co. v. Lindsey* (D. C. 1915) 225 Fed. 257, distinguishing *The Conveyor*, *supra*, footnote 41.

⁴⁴ *Glenn, Creditors' Rights* (1915) Chapters XVI, XVII, XIX, *passim*.

the creditors, even though that representative may, as in the case of bankruptcy, acquire by virtue of his appointment a statutory title to the estate which relates back to the adjudication; nor does the intervention of this *ex post facto* title breach the warranty against a change of title or interest.⁴⁶ It is also true that any sort of creditor's representative, though he hold but the office of temporary receiver, may insure the estate in his charge.⁴⁷ The general representative thus having the right to insure in behalf of all the creditors, it would be logical to conclude that no individual creditor has any such privilege.⁴⁸ However, there may be an interval between the liquidating point and the appointment of the creditor's representative. As we have seen, this does not cut off the right of the debtor to insure;⁴⁹ and it also seems proper to allow individual creditors to insure as well.⁵⁰ Yet there should be the corollary that whoever thus singly insures, whether it be the debtor or the individual creditor, should be decreed to hold the proceeds for the benefit of the estate.

With that proviso,—and no authority has been found against it,—we have completed our inquiry into the nature of creditor insurance on property; and we have found in it nothing inconsistent with the doctrine of creditors' rights, nor anything that does not illustrate the simple rules of which that doctrine is made. The creditor's capacity to insure the debtor's property is simply the image of the right to realize upon the property, and there is no distortion of the likeness in any aspect of insurance law. Nor is the logic different when the debtor insures the property. Then the creditor's right to the policy or its proceeds is no greater and no less than his right to any other asset of the debtor's; he takes nothing unless either he can seize the contract by appropriate steps at the foot of a judgment, or he can show an assignment from the debtor or that the latter has made him the payee of the contract,—the "beneficiary of the policy", to use the phrase of insurance law.

The last raises a question always present with life insurance. There is no difficulty with either kind of insurance, whether it be on the debtor's property or on his life, if the debtor has assigned the

⁴⁶*Underground Electric Rys. v. Owsley* (1909) 176 Fed. 26.

⁴⁷*Fuller v. Jameson* (1904) 98 App. Div. 53, 90 N. Y. Supp. 456, *affd.* (1906) 184 N. Y. 605, 77 N. E. 1187; *Fuller v. Ins. Co.* (1903) 184 Mass. 12, 67 N. E. 472.

⁴⁸*Herkimer v. Rice* (1863) 27 N. Y. 163; *Reilley v. Buffalo Ins. Co.* (1914) 86 Misc. 69, 147 N. Y. Supp. 1086.

⁴⁹"Every creditor of an estate held by an executor or trustee has an interest in the preservation of that property, but it by no means follows that he has an insurable interest in his own name. The executor or trustee represents the creditor, and his interest may and should be protected by an insurance in the name of such executor or trustee." *Bishop v. Clay Ins. Co.* (1881) 49 Conn. 167, 174.

⁵⁰*Supra*, footnote 46.

⁵⁰*Rohrbach v. Germania Co.* (1875) 62 N. Y. 47 (Creditor of decedent's estate prior to issuance of letters of administration).

policy to the creditor, or has made him the beneficiary of it, in order to secure the debt. Such dealings in a life policy are of every-day occurrence; these contracts are recognized as commercial assets, and hence the debtor should be able to alien or pledge his life insurance as freely as any other of his assets. To this the Supreme Court has finally come, at last conforming, after many *dicta* to the contrary, with the rule in force in England and most of our states.⁵¹ And, as we have seen, the debtor may make the creditor the beneficiary of a fire or marine policy, or assign the policy to him as security for the debt. Provisions of the policy forbidding such treatment may bar recovery, but, if the underwriter should waive the condition, it is not for the debtor to deny the creditor's title.⁵² Decisions allowing the debtor to make the creditor the beneficiary of a fire policy, or to assign the policy to him, in final analysis reduce themselves to the proposition that the debtor has given the creditor a lien on the policy as security for his debt; in other words, the creditor's right to the insurance rests on a contract of hypothecation such as he must have, in the absence of a judgment, when he seeks the right to dispose of any portion of his debtor's property.⁵³ Therefore in any such case the creditor's recovery is for the benefit of the debtor to the extent that the recovery may exceed the amount of the debt. Nor is there any difficulty in law about a debtor's policy of life insurance constituting assets for his creditors. The difficulties of realizing on such an asset are inherent in its nature, because it is a contract of most peculiar terms; but, so far as any such contract can be made to produce value for creditors, the courts, aided by such statutes as the Bankruptcy Act, find nothing in the law of creditors' rights to pull them short.^{53a}

So far life and fire insurance equally adjust themselves to the law of creditors' rights. But an immediate departure is made when we consider the right of the creditor to insure the debtor's life, or, what amounts to the same thing, to have the debtor himself effect the

⁵¹*Grigsby v. Russell* (1911) 222 U. S. 149, 32 Sup. Ct. 58; *infra*, footnote 54.

⁵²*Leinkauf v. Coleman*, *supra*, footnote 40, is a case of this sort.

⁵³*Bruce v. Garden* (1869) L. R. 5 Ch. App. 32. With the mortgagee clause, the rule is likewise clear. The mortgagee may sue alone, treating himself as holding the surplus as trustee for the mortgagor, *Cone v. Niagara etc. Co.* (1875) 60 N. Y. 619, or the two may join, *Winne v. Niagara etc. Co.* (1883) 91 N. Y. 185, or, if the mortgagee refuses to sue, the mortgagor may sue alone, joining the mortgagee as a party defendant, *Lewis v. Guardian Insurance Co.* (1905) 181 N. Y. 392, 74 N. E. 224. Of course as long as any part of the secured debt remains the mortgagee is a necessary party to any suit, *McDowell v. St. Paul Co.* (1913) 207 N. Y. 482, 101 N. E. 457; but, if the mortgage has been paid, then the mortgagor may sue alone, and need not join the mortgagee. *North British, etc. Co. v. Rose* (C. C. A. 1916) 228 Fed. 290.

^{53a}See Glenn, *Creditors' Rights* (1915) §§ 53-6. As to possible difference between the rights of creditors under the national Bankruptcy Act and the right of the judgment creditor, see *Chelsea Bank v. Travelers Ins. Co.* (1916) 173 App. Div. 829, 160 N. Y. S. 225.

insurance, naming the creditor as beneficiary, with no agreement that the policy shall stand merely as security for the debt.

There we find hopeless variances, all of which are well described in a recent volume of this REVIEW.⁵⁴ First of all, the debt may be paid before the policy of insurance falls in. May the creditor still recover on the insurance? Originally in England it was held that he could not;⁵⁵ but that was overruled later, and recovery was allowed though the debtor owed nothing at the time.⁵⁶ Second, the debt may exist at the time of the debtor's death and yet there may be such a disparity between the debt and the insurance as to prevent recovery.⁵⁷ But if there is not so great a disparity as that, and still there is an excess of insurance over the debt plus premiums paid by the creditor with interest thereon, there is quite a difference of opinion as to whether the surplus should go to the creditor. One line of cases⁵⁸ gives the creditor the surplus, another gives it to the debtor's estate,⁵⁹ while in Pennsylvania the amount of the creditor's insurance cannot lawfully exceed the debt, plus future premiums, estimated according to the tables of mortality, and interest on debt and premiums.⁶⁰

This conflict of opinion in the case of life insurance bears sharp contrast with the steady logic which, as we have seen, governs in all cases of property insurance. But there would be no conflict of opinion if due respect were given to a certain difference, between the two kinds of insurance, which is obscured by failure to view the case from the standpoint of creditors' rights. For the distinction lies wholly in a conception of such rights, not in any theories of insurable interest. Those theories have their place in such a discussion, but they are underlaid by the simple rules governing the relation of creditor to debtor, which have already been outlined.

Since the creditor has no interest in anything of the debtor's until he acquires, by contract, levy or liquidation proceedings, the right to realize his debt out of the thing in question, obviously the right of realization can affect nothing that is not property. From this it follows that the life of the debtor cannot constitute an asset available for the creditor. In the states of the old South, prior to the Civil War, the life of a slave was available for creditor insurance, because the slave could be taken in execution against his owner; but the life of his free master was not the property of anyone else and

⁵⁴ Edwin W. Patterson, *Insurable Interest in Life* (1918) 18 COLUMBIA LAW REVIEW 381.

⁵⁵ *Godsall v. Boldero* (1807) 9 East 72.

⁵⁶ *Dalby v. London, etc. Insurance Co.* (1854) 15 C. B. 365.

⁵⁷ *Cammack v. Lewis* (U. S. 1872) 15 Wall. 643 (Insurance \$3,000, debt \$70) and other cases cited in Professor Patterson's essay, *supra*, footnote 54.

⁵⁸ Headed by *Rittler v. Smith* (1889) 70 Md. 261, 16 Atl. 890.

⁵⁹ Headed by *Cheeves v. Anders* (1894) 87 Tex. 287, 28 S. W. 274.

⁶⁰ *Wheeland v. Atwood* (1899) 192 Pa. St. 237, 43 Atl. 946. See Professor Patterson's article, *supra*, footnote 54, for other authorities.

could not be made such by any act or deed. And so far have the courts gone with this train of thought, that long ago it was settled that creditors have no interest even in that attribute of every man's life, his productive capacity. His labor does not belong to them; and so no fraudulent transfer has occurred if the effects of his labor appear in the enrichment of a third party's estate.⁶¹ Likewise his person is sacred. Subject to body execution it may be, but the object of that, as previously said, is to coerce payment; and, save to take him under a writ of body execution, no officer may lay hands upon the debtor; even though he may have valuables on his person, the turn-over of these can be effected only through the coercive processes which equity's ancillary aid may afford.⁶² But coercive measures to induce payment or turn-over of property, cannot be reflected in anything that savors of value. Just because you can possibly nag a man into paying his debt, it does not follow that his life is worth the debt. One's personal liberty is not the measure of his span of life; and even the physical proceedings involved in a body execution or a contempt order leave a choice to the debtor; a choice, it is true, between obedience and imprisonment, but still a choice. The annals of the Fleet and the Marshalsea all remind us that neither the debtor's measure of life, nor his predilection for liberty, has such exact relation to the probability of payment as to make the one computable in terms of the other.

Consequently the insurance aspects of a man's life cannot, by any stretch of the legal imagination, be considered as insuring to the benefit of his creditor. The debtor's life has in it nothing in which a third person can feature a property right. One can value his own life at what he pleases for purposes of insurance,⁶³ but it does not follow that it has the slightest value, from a property standpoint, for anyone else. Certainly, so far as the creditor is concerned, the debtor's life has no value, because nothing can be directly made of it by any process of realization known to our law.

In reaching this conclusion we have not overlooked the practical interest that a debtor's life and activities may have for his creditor. It often goes hard with the creditor that death has closed in upon a capable mind and dammed the channels of its activities, before results could appear in the enlargement of an estate sufficiently to meet the

⁶¹ Glenn, *Creditors' Rights* (1915) § 28.

⁶² Consequently the clothes upon his person and even ornaments, such as rings, cannot be taken off his person by the writ. *Bumpus v. Maynard* (N. Y. 1861) 38 Barb. 626. "For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin." *Union Pac. Ry. v. Botsford* (1891) 141 U. S. 250, 251, 11 Sup. Ct. 1000.

⁶³ "One thing may be taken as settled, that every man has an interest in his own life to any amount in which he chooses to value it, and may insure it accordingly." Shaw, C. J., in *Loomis v. Eagle Life Ins. Co.* (1856) 72 Mass. 396, 399. See also *Fidelity, etc. Co. v. Jeffords* (C. C. A. 1901) 107 Fed. 402.

obligations that a too sanguine temperament had created. But it is not a necessary conclusion that the creditor has any interest in the debtor's life which he can logically insure. Quite as aggravating a case can be made out for the non-judgment creditor without security who sees his debtor's warehouse go up in flames. In each case the creditor loses, but in neither case has he anything to insure. The only sound thought, therefore, which any such situation suggests is that the results of causes must not be confused with causes themselves. Just because you may suffer financially by the loss of a life or the destruction of an object, it does not follow that the life was yours, or that you owned the thing whose remains are all that you now see. The conditions of human intercourse are too complex for that.

Thus the case where the creditor insures the debtor's life does not respond to the law of creditors' rights because it is not within that law. The circumstance that the party effecting the insurance is a creditor is therefore merely an accident,—he might just as well be a nephew or a friend,—and the case is not one of creditors' rights at all. Logically the inquiry could be closed at this point; but the conflict of authority in such cases, on which observation has already been made, justifies what is to follow.

Such cases, being not cases of creditors' rights, are therefore fitly to be governed by the principles of insurance law. That branch of law has a very apposite rule for such matters,—the doctrine of insurable interest. But, in order to appreciate its present application, a few words as to this doctrine will be in order.

When insurance law was taking form, the situation would have allowed of anyone's life or goods being insured by the veriest stranger. Originally, as Parke, B., has shown us,⁶⁴ the idea of the insurance contract was perverted for purposes of sheer gaming, and this occurred in the case of marine policies as well as with life insurance. In short, one party would bet another that a certain ship would not encounter the perils of the seas, or that a man would not die, without either gamester having the slightest interest, using that word in its broadest meaning, in either the ship and its voyage, or the man and his well-being. Statutes in England, to which Baron Parke refers, forbade the enforcement of such contracts except where the insured had

⁶⁴*Dalby v. Ins. Co.*, *supra*, footnote 56. "Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by [1746] 19 Geo. II, c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the [1774] 14 Geo. III, c. 48, as to insurance on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts . . . The statute recites, that the making insurances on lives and other events wherein the insured shall have no interest, hath introduced a mischievous kind of gaming", *etc.* *Dalby v. Ins. Co.* *supra*, footnote 56, at page 387; Professor Patterson's article, *supra*, footnote 54.

an interest in the vessel or the life constituting the subject matter of the contract. By reason of the year of its enactment the latter of these statutes did not pass to us with our common law inheritance, but that is immaterial in view of the position of our courts that they will refuse to enforce gambling contracts on grounds of public policy, entirely irrespective of statute law.⁶⁵

Now, the application of this doctrine could not be uniform because of the fact that has already presented itself to our own inquiry. Insurances like those against fire and the perils of the seas cover things which are capable of ownership, whereas insurances on lives touch something that has no attribute of property. Furthermore, the thought of property carries with it the idea of value, whereas that which is not property cannot force any such proposition upon the judicial mind.

This distinction led to important results. With property insurance the courts had always tied up the doctrine of insurable interest with the proposition of loss. No man can lose through the destruction of something that he does not own, and hence the thought of loss carries us straight back to the idea of ownership; and thus insurances of the class of fire and marine always were contracts of indemnity.⁶⁶ Such was always the rule; and hence the only way of writing a gaming policy in fire or marine insurance was to insert the words "interest or no interest." In the absence of such words the policy was one of indemnity, and always so construed.⁶⁷ The statute to which Baron Parke refers, therefore, simply forbade, so far as fire and marine policies were concerned, the insertion of the words "interest or no interest", and left them contracts of indemnity as they always were without such words. The insured recovers on such a policy to the extent of his loss, and the measure of his loss is the extent of his ownership. There may be many different interests in the same physical object; and, against fire burning it or the perils of the sea

⁶⁵ "Although the statute has never been taken as a part of our law, this rule was generally followed in this country, as declaratory of the common law." *Cronin v. Vermont Ins. Co.* (1898) 20 R. I. 570, 40 Atl. 497. "In discussing the question in this Commonwealth, we are to consider it solely as a question at common law, unaffected by the St. of 14 G. 3, c. 48, passed about the time of the commencement of the Revolution, and never adopted in this state." *Loomis v. Eagle etc. Co. supra*, footnote 63, at page 398. The same idea was applied to other sorts of gambling contracts. *Irwin v. Williar* (1884) 110 U. S. 499, 4 Sup. Ct. 160.

⁶⁶ "The whole insurance system rests on indemnity for loss to the insured, and where there is no loss of course there is no need for indemnity; and therefore there must be some interest in the premises burnt at the time of the fire, otherwise there can be no recovery." *Monroe v. Southern Mut. Ins. Co.* (1879) 63 Ga. 669, 671. "The contract is regarded as one for an indemnity to the amount insured, and unless the insured has an interest at the time of the loss, he is not damaged and cannot be entitled to recover." *Murdock v. Chenango Co.* (1849) 2 N. Y. 210, 216.

⁶⁷ *Saddlers' Co. v. Badcock* (1743) 2 Atk. 554; *Lynch v. Dalzell* (1729) 4 Bro. P. C. 431.

encompassing it, all having interest may lawfully insure. But in the end no one gets more than his due in the measure of ownership as recognized by law.⁶⁸ These ideas have never been really confused. For example, there is nothing illogical in allowing a mortgagee to recover despite the fact that he holds other collateral,⁶⁹ because his contract with the debtor allows him the privilege of realizing on this very security if he pleases; nor is the insurer hurt by being compelled to pay, because, according to the weight of authority, he is entitled to subrogation on the debt *pro tanto*.⁷⁰

This fact, that insurable interest means property interest, accounts for the strict logic with which fire and marine insurances respond to the law of creditors' rights. Creditor insurance, as applied to the debtor's property, is solely a matter of property interest; and the creditor's property interest is defined, not by any rule of insurance law, for there is none necessary on the subject, but by the law of creditors' rights.

But insurable interest could find no such outside standard of measurement in the case of life insurance. In every case of life insurance, as we have seen, the courts had to face the fact that no man can own the life of another. This led the courts to a hit or miss rule, in default of a better, regarding life insurance, a rule of which vagueness is still the characteristic. It is unnecessary here to discuss this rule, which rests, as best it can, on the idea of making insurable interest correspond with the thought of benefits to come so long as the insured life should continue. This of course lets in the creditor; for if the dependent niece can insure the kind-hearted uncle,

⁶⁸ This proposition is well put by Mellish, L. J.: "Where different persons insure the same property in respect of their different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person became insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think whenever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation." *North British Co. v. London, etc. Co.* (1877) 5 Ch. D. 569, 583.

⁶⁹ *Excelsior Co. v. Royal Co. supra*, footnote 3.

⁷⁰ *Supra*, footnote 2.

surely the creditor can cover the chance of his debtor dying before making payment. And so he is allowed to take out such a policy, provided that there is not so great a disparity between the principal of the debt and the insurance as to suggest a gaming intent,⁷¹ except in Pennsylvania where, as we have seen, the creditor is limited to a fixed sum computed according to the tables of mortality.⁷²

Tested by this, there should have been no conflict of view on the case where, when the debtor dies, the insurance exceeds the debt. The loose-jointed rule of insurable interest having once given the creditor the right to insure the debtor's life, there is no sense in inventing a second hit or miss rule to deprive him of any portion of the insurance when the policy becomes due. For it is not the amount of the debt that gives him the insurable interest, but the mere fact that he is a creditor, provided, of course, there is no gaming intent. Inasmuch as this "insurable interest" has in it nothing of the definite, in general it need only exist at the time when the policy issues; it being wholly immaterial how soon thereafter the relationship which justified the issuance of the policy should wholly cease.⁷³ This was logically applied by the English courts to creditor insurance; it being finally held, as we have seen, that it is sufficient if the debt existed when the policy is issued, and that the subsequent payment of the debt is wholly immaterial.⁷⁴ And it is worthy of note that the Supreme Court, finally falling into line with the proposition that a man who in good faith has insured his own life for his own benefit may thereafter dispose of the policy as it may please him, even if he should sell or pledge it to a person having no "insurable interest",⁷⁵ cites this English rule with approval. The weight of logic therefore rests with the courts which allow no part of the surplus to go to the debtor's estate, in case the insurance exceeds any part of the debt that might remain unpaid, and wholly against such a rule as that favored in Pennsylvania, which prescribes the amount of insurance which the creditor may procure.

But all of this lies outside of the domain of creditors' rights. To repeat, when the creditor insures his debtor's life no rule of law can apply except that rule of public policy which deals with the matter of insurable interest, and in the application of that rule the relation of debtor and creditor should be of importance only as satisfying that rule at the outset of the contract. It is only when the debtor's prop-

⁷¹*Cammack v. Lewis*, *supra*, footnote 57. This is but an application of the same rule that, while recognizing the right of a debtor to deal in a policy on his own life as a commercial asset (*Grigsby v. Russell*, *supra*, footnote 51) still forbids the taking out of a policy followed by an immediate assignment of it, if the two are so tied together as to evidence an intent to effect a gaming contract. See *Finnie v. Walker* (C. C. A. 1919) 257 Fed. 698.

⁷²*Supra*, footnote 60.

⁷³*Conn. Ins. Co. v. Schaefer* (1874) 94 U. S. 457.

⁷⁴*Dalby v. Ins. Co.*, *supra*, footnote 56.

⁷⁵*Grigsby v. Russell*, *supra*, footnote 51.

city constitutes the subject-matter of the policy that insurance law stops short; for there insurable interest means property interest. And to understand the interest of the creditor in his debtor's property we must always, as suggested at the beginning, turn away from insurance law to a collection of rules which are simple because they are fundamental, and which have never yet been withstood .

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